

# The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws

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## ABSTRACT

*Consent to ICSID jurisdiction may be given in different ways. One option is for the host state to offer its consent to ICSID by way of its national legislation. The aim of this article is to discuss how a domestic provision granting jurisdiction to ICSID ought to be interpreted. The article first describes the requirements for consent to ICSID arbitration and examines the specific challenges posed by domestic law clauses that grant jurisdiction to ICSID. It then analyses consent clauses contained in investment laws of several states, with reference to relevant arbitral decisions. Finally, it turns to the issue of interpretation of such consent clauses. In this regard, the article discusses the possible role that the ILC 'Guiding Principles' on unilateral declarations of states of 2006 might play in interpreting domestic provisions containing an offer to arbitrate before ICSID.*

## I. INTRODUCTION

DEVELOPING COUNTRIES wishing to open their economies to foreign capital often enact domestic laws (typically a foreign investment law or investment code) aimed at granting foreign investors standards of protection. In fact, in the last decades most developing countries and economies in transition have adopted, and sometimes revised and amended, such laws.<sup>1</sup> These domestic laws have the same goal as investment treaties, i.e. to encourage private companies to invest in the host state and to allay their possible fears about the presence of an unstable

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<sup>1</sup> The most complete collection of domestic investment laws can be found in *Investment Laws of the World*, published by ICSID starting from 1973.

and unpredictable legal framework for their investments. Similarly to investment treaties, investment laws generally begin by defining terms such as 'investment' and 'investor'. They then contain a central part about substantive standards of treatment: the host state usually grants investors fair and equitable treatment, national and most-favoured-nation treatment, protection from arbitrary and discriminatory measures, protection from nationalisation and expropriation, and the right to free transfer of their capital. Familiar formulas (such as 'prompt, adequate and effective compensation') are also at times present. The final part of a domestic investment law, again paralleling investment treaties, normally deals with the settlement of disputes between the host state and the foreign investor, and includes references to domestic courts and/or to investor-state arbitration.

While in their goals and basic structure investment laws are akin to bilateral investment treaties (BITs) or multilateral treaties, these laws raise certain particular problems connected with the fact that they contain assurances given by host states *unilaterally* to every possible foreign investor. This article intends to address a specific aspect concerning domestic investment laws: the issue of the state's consent to arbitration before the International Centre for Settlement of Investment Disputes (ICSID), which may be included amongst the guarantees granted to investors by host states in their domestic laws. As will be seen throughout this work, consent to ICSID arbitration can also be established where a foreign investor accepts a unilateral offer made by a state party to the ICSID Convention through its domestic investment legislation. Since consent is the cornerstone of the Centre's jurisdiction, any arbitral tribunal must approach the task of ascertaining the existence of such consent with great care.

The topic of consent to ICSID arbitration contained in domestic investment laws has been relatively scarcely explored by international investment law scholars, especially compared to the ever-growing number of articles and monographs devoted to BITs and multilateral treaties. This appears somewhat surprising if one considers that several jurisdictions include references to ICSID in their respective investment laws. In this context, the scope of the state's consent may be ambiguous, providing potential grounds for the respondent's objections to jurisdiction. A renewed interest in provisions of this type has arisen as a result of recent ICSID proceedings commenced by a number of foreign investors against Venezuela, based, exclusively or partially, on Venezuela's Foreign Investment Law.<sup>2</sup> On 10

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<sup>2</sup> The cases of *Mobil Corp. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, *ConocoPhillips Co. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30 and *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, are based on relevant BITs, as well as on art. 22 of Venezuela's Foreign Investment Law, which contains a reference to ICSID arbitration. Venezuela's Foreign Investment Law, art. 22 appears to be the only jurisdictional basis in *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3. See Victorino Tejera Pérez, 'Do Municipal Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study' in I. Laird and T. Weiler (eds.), *Investment Treaty Arbitration and International Law* (2009), vol. II, p. 85 at p. 91. See also, *Opic Karimum Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14 and *Tidewater Inc. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, both recently filed with ICSID, which appear to be based, exclusively or partially, on art. 22 of Venezuela's Foreign Investment Law. See also *infra* n. 43.

June 2010, the ICSID tribunal in the *Mobil v. Venezuela* case was the first to rule on the issue of consent to ICSID arbitration based on that controversial domestic provision, followed, on 30 December 2010, by the tribunal in *Cemex v. Venezuela*.<sup>3</sup>

This article proceeds in three parts. Part II first describes, in general terms, the requirements for consent to ICSID arbitration and then turns to examining the challenges posed by domestic law clauses that grant jurisdiction to ICSID. Part III surveys investment laws of several states and tries to identify patterns in the consent clauses contained therein. Where applicable, reference is made to past relevant arbitral decisions which had the opportunity to review such clauses. Finally, Part IV seeks to determine how a domestic provision granting jurisdiction to ICSID ought to be interpreted. In this regard, the article discusses the possible role that the 'Guiding Principles' on unilateral declarations of states, approved in 2006 by the International Law Commission (ILC), might play in interpreting domestic provisions containing an offer to arbitrate before ICSID. Possible interpretative solutions derived from those guidelines are juxtaposed to the approach taken by arbitral tribunals on the issue of interpretation of consent clauses. Lastly, the importance of good faith and investors' legitimate expectations in relation to the interpretation of consent to ICSID is analysed.

## II. CONSENT TO ICSID ARBITRATION

Like any form of arbitration, ICSID arbitration is always based on consent of both parties.<sup>4</sup> The Report of the Executive Directors of the International Bank for Reconstruction and Development which accompanies the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention') defines consent of the parties as 'the cornerstone of the jurisdiction of the Centre'.<sup>5</sup> The Preamble of the ICSID Convention mentions the requirement of consent twice<sup>6</sup> and makes clear that no contracting state shall, by the mere fact of its ratification, acceptance or approval of the Convention, be deemed to be under any obligation to submit any particular dispute to arbitration.<sup>7</sup>

<sup>3</sup> *Mobil Corp. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010; *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010. Judge Gilbert Guillaume was the President of both arbitral tribunals.

<sup>4</sup> See Christoph Schreuer *et al.*, *The ICSID Convention: A Commentary* (2nd edn, 2009), pp. 190–192; Aron Broches, 'The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction' in (1996) 5 *Columbia Journal of Transnational Law* 263; Georges Delaume, 'Consent to ICSID Arbitration' in J. Norton *et al.* (eds.), *The Changing World of International Law in the Twenty-First Century: A Tribute to the Late Kenneth R. Simmonds* (1998), p. 155 at p. 156.

<sup>5</sup> See Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, para. 23, available at <http://icsid.worldbank.org>.

<sup>6</sup> See Preamble to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, (1965) 4 ILM 524.

<sup>7</sup> *Ibid.* ('Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration').

Article 25 of the ICSID Convention, which is the first provision of the Convention's Chapter devoted to the jurisdiction of the Centre, requires that the agreement to arbitrate between the host state and the foreign investors be 'in writing'. The first sentence of that Article reads:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

It is customary to say that consent to ICSID arbitration may be given in three different ways.<sup>8</sup> First, the agreement between the parties recording consent to ICSID arbitration may be achieved through a compromissory clause in an investment agreement between the host state and the investor submitting future disputes to the jurisdiction of the Centre (or through a *compromis*, if the dispute has already arisen). A second method to give consent to ICSID jurisdiction is through a treaty (bilateral or multilateral) between the host state and the investor's state of nationality, containing an ICSID arbitration clause. As a third option, states may offer their consent to ICSID jurisdiction by way of their national legislation.

While the practice of the last decades incontrovertibly shows a predominance of cases brought to ICSID through arbitration clauses contained in a BIT or in an investment agreement,<sup>9</sup> it has always been undisputed, since the very establishment of the Centre, that consent could take the form of an acceptance by a foreign investor of an offer made by a state party to the ICSID Convention in its own investment legislation.<sup>10</sup> The already mentioned Report of the Executive Directors accompanying the Convention, while not mentioning consent contained in a treaty, clearly envisages the possibility for a state to 'offer' to submit disputes to ICSID in its domestic statutes:

Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.<sup>11</sup>

<sup>8</sup> See extensively, Schreuer *et al.*, *supra* n. 4 at pp. 192–217; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2008), pp. 238–253.

<sup>9</sup> According to statistics provided by the ICSID Secretariat, the legal basis invoked to establish the jurisdiction of the Centre in cases registered as of 30 June 2010 has been a clause contained in a BIT (63% of the registered cases), a clause contained in a multilateral treaty, such as NAFTA or the Energy Charter Treaty (10%), an arbitration clause in an investment agreement (22%) and a provision contained in the host state's legislation (5%). See *The ICSID Caseload: Statistics* (2010), no. 2, p. 10, available at <http://icsid.worldbank.org>. However, according to the same report, there has been a remarkable rise in ICSID registered cases based on the host state's investment legislation (10%) in the period between 1 July 2009 to 30 June 2010. See *ibid.* p. 20.

<sup>10</sup> See Schreuer *et al.*, *supra* n. 4 at pp. 196–205; Delaume, *supra* note 4 at pp. 161–164. According to Jan Paulsson, 'Arbitration Without Privity' in (1995) 10 *ICSID Rev. – Foreign Inv. LJ* 232 at p. 234, 'the principle that national investment laws may create compulsory arbitration without privity is beyond cavil'.

<sup>11</sup> *Report of the Executive Directors*, *supra* n. 5 at para. 24.

When referring to those two different methods of expressing consent to arbitration (through a treaty and through domestic legislation), Jan Paulsson, in an article published in 1995 in the *ICSID Review*, famously coined the term 'arbitration without privity', that is, arbitration 'where the claimant need not have a contractual relationship with the defendant'.<sup>12</sup>

Let us briefly examine how such consent comes into existence in the event of an offer by the state contained in its own laws. The perspective is, at the end of the day, the traditional offer-acceptance method, derived from the contractual world. In fact, in order to amount to a consent agreement, the offer contained in national legislation must be accepted by the investor. This can be done by simply instituting arbitral proceedings.<sup>13</sup> The creation of such a bond between the will of the state and that of the claimant is not very different from the situation which arises when the investor avails itself of an arbitration clause contained in a treaty which has been entered into by the host state and the investor's state of nationality. In both cases, the investor may wait until a dispute has arisen to announce its intention to resort to arbitration. However, consent to arbitration is obviously much more precarious when contained in a domestic statute than it is when included in a treaty. In the first case, the state may amend the law (or abrogate it) unilaterally at any time, thus withdrawing its offer to arbitrate, whereas in the latter case it needs the other state's consent to do so. That is why investors are advised to accept in writing the offer contained in the host state's legislation even before the dispute arises.<sup>14</sup> If the legislation embodying an offer to adjudicate disputes before ICSID is repealed before consent is perfected (because the investor has not instituted arbitral proceedings yet nor notified its acceptance in writing at an earlier stage), then the investor loses the possibility of resorting to ICSID in the future.<sup>15</sup> This shows once again the higher volatility of an offer to arbitrate included in a domestic statute as compared to one contained in a BIT.

<sup>12</sup> See Paulsson, *supra* n. 10 at p. 232.

<sup>13</sup> See Schreuer *et al.*, *supra* n. 4 at pp. 202–205. See also, *Tradex Hellas (Greece) v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996, (1999) 14 *ICSID Rev. – Foreign Inv. LJ* 161 at pp. 186–187 (where the arbitral tribunal noted that 'although consent by written agreement is the usual method of submission to ICSID jurisdiction, it can now be considered as established and not requiring further reasoning that such consent can also be effected unilaterally by a Contracting State in its national laws, the consent becoming effective at the latest if and when the foreign investor files its claim with ICSID making use of the respective national law'); *Ceskoslovenska Obchodni Banka, AS (CSOB) v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, (1999) 14 *ICSID Rev. – Foreign Inv. LJ* 251 at p. 266, para. 44 (where the arbitral tribunal noted that 'ICSID practice also indicates that the exchange of written consents required for ICSID jurisdiction can be satisfied not only by the mutual acceptances of bilateral investment treaties, but also by other forms of acceptances. Many investment laws of developing countries provide for the State's acceptance of ICSID jurisdiction (or for alternative dispute resolution methods) for disputes with the investor arising out of a particular investment. Under some laws the offer is deemed to be accepted as soon as the foreign investor files an investment application pursuant to such a law, regardless of whether the application includes a reference to the arbitration provision contained in the law').

<sup>14</sup> See Schreuer *et al.*, *supra* n. 4 at p. 203.

<sup>15</sup> But see *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paras. 332–336 (where the tribunal discussed its jurisdiction on the basis of the host state's legislation, which had been repealed, and noted that it was 'well established in international law that a State may not take away accrued rights of a foreign investor by domestic legislation abrogating the law granting these rights').

In fact, even in the event of a unilateral denunciation of the treaty by the host state (which is usually possible, and which is not unknown in practice),<sup>16</sup> investors having already made their investment continue to enjoy the rights granted to them by the treaty for a certain number of years following denunciation.<sup>17</sup> The situation is different with domestic legislation. Except for the (in any event arguable) case where the repealed domestic law was by its own terms formulated so as to 'freeze' the rights granted to investors for a certain number of years (similarly to what happens with contractual 'stabilisation clauses'), it would seem hard for an ICSID tribunal to accept jurisdiction if no consent has been perfected at the time when the law was in force.

Once consent is perfected through the investor's acceptance, it becomes irrevocable. Article 25(1), last sentence, of the ICSID Convention provides to this effect:

When the parties have given their consent, no party may withdraw its consent unilaterally.

Thus, if the investor has accepted the offer in writing during the legislation's lifetime, '[t]he consent agreed to by the parties ... becomes insulated from the validity of the legislation containing the offer'.<sup>18</sup>

### III. THE VARIETY OF LANGUAGE IN DOMESTIC INVESTMENT LAWS

The above-described hallmarks generally concern consent to ICSID jurisdiction perfected through the acceptance of an offer contained in a domestic law. The situation is, however, more complicated, because the conclusion that a host state has consented to ICSID jurisdiction by way of its own legislation is only the outcome of a process of interpreting the wording of that particular law.

An analysis of dozens of investment promotion laws shows not only that there is great variety in the wording of the dispute settlement clauses, but also that very few contain an unequivocally worded offer by the host state to arbitrate before ICSID.<sup>19</sup>

Before embarking upon a survey of the most frequent patterns found in investment promotion laws, it is worth noting that in 1968, ICSID itself elaborated certain 'model clauses' that it offered as samples to states and investors.<sup>20</sup> Those model clauses are mainly meant to be inserted in investment contracts and range from a very basic compromissory clause to more elaborate provisions concerning the applicable law of the investment agreement, the rules

<sup>16</sup> For example, in 2008 Venezuela terminated the BIT entered into with the Netherlands. See Luke Eric Peterson in 1(1) *Investment Arbitration Reporter*, 16 May 2008, available at [www.iareporter.com](http://www.iareporter.com).

<sup>17</sup> See Laurence Helfer, 'Exiting Treaties' in (2005) 91 *Virginia Law Review* 1579 at p. 1625.

<sup>18</sup> See Schreuer *et al.*, *supra* n. 4 at p. 259.

<sup>19</sup> One of the first analyses of dispute settlement provisions in domestic laws can be found in Antonio Parra, 'Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment' in (1997) 12 *ICSID Rev. - Foreign Inv. LJ* 287.

<sup>20</sup> See Model Clauses Recording Consent to the Jurisdiction of the International Centre for Settlement of Investment Disputes (1968) 7 *ILM* 1159.

of procedure to be followed by the arbitral tribunal, the powers of such a tribunal, and the allocation of costs of the proceedings. As far as domestic laws are concerned, ICSID included among those clauses one which was specifically addressed to the event where a host state wishes to include in its legislation an offer to arbitrate disputes before ICSID.<sup>21</sup> In 1981 and 1993, the model clauses were revised.<sup>22</sup> This time, all model clauses concerned contractual undertakings between state and foreign investor, and no clause specifically envisaged for domestic legislation was included. It must be noted that these model clauses adopted by ICSID have neither binding force towards states, who remain free to draft their dispute settlement provisions as they wish, nor even any 'interpretative' value (meaning that only a provision which is similar to the model clause proposed by ICSID would embody state consent to arbitration). Such clauses are mere suggestions offered by ICSID for the convenience of states and private investors. As the commentary accompanying the 1993 model clauses highlights, '[t]he only formal requirement that the Convention establishes with respect to the consent of the parties is that such consent be in writing ... Nor is any special form of words required. The following clauses thus are intended merely as models. Actual clauses will vary in substance and terminology according to the circumstances of each case'.<sup>23</sup>

As already mentioned, states over the years have used very different formulations in drafting dispute settlement provisions in their investment laws. The following analysis shows, however, that certain patterns can be recognised.<sup>24</sup>

A number of domestic laws do not allow recourse to arbitration, but merely provide for settlement of disputes through the host state's domestic courts.<sup>25</sup> Other laws generically refer to 'international arbitration', to which the parties have to agree.<sup>26</sup> In other cases, the law simply 'reminds' of the fact that bilateral or multilateral treaties, to which the host state is a party, may provide for

<sup>21</sup> Model Clause IIa reads: 'The Government of [name of Contracting State] hereby consents to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre"), for settlement by [conciliation]/[arbitration]/[conciliation followed, if the dispute remains unresolved within [time limit] of the communication of the report of the Conciliation Commission to the parties, by arbitration] pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the "Convention"), all disputes arising out of any investment made, by a national of another Contracting State (as defined by the Convention), pursuant to this [Law]/[Decree], provided that the investor files a similar consent in writing with [name of official or office], and complies with the following additional conditions ...'.

<sup>22</sup> ICSID Model Clauses (July 1981), 1 ICSID Rep. 197; ICSID Model Clauses (1 February 1993), 4 ICSID Rep. 357.

<sup>23</sup> ICSID Model Clauses (1 February 1993), *supra* n. 22 at p. 359.

<sup>24</sup> Most dispute settlement clauses, for example, refer to the making of efforts to reach an amicable settlement through negotiations between investors and host state before recourse to arbitration is possible.

<sup>25</sup> See e.g., art. 24 of the Law of the Republic of Armenia on Foreign Investments, 31 July 1994, *Investment Laws of the World*, ICSID Release 95-3, issued June 1995.

<sup>26</sup> See e.g., art. 22 of Estonian Law on Foreign Investments, 11 September 1991, *Investment Laws of the World*, ICSID Release 94-4, issued July 1994; art. 32(4) of the Law of the Republic of Indonesia concerning Investment (Law No. 25 of 2007, 15 May 2007), *Investment Laws of the World*, ICSID Release 2008-2, issued July 2008; art. 42 of the Law of Azerbaijan Republic on Protection of Foreign Investments (No. 57, dated 15 January 1992, as amended by Law No. 97, dated 7 April 1992), *Investment Laws of the World*, ICSID Release 2004-1, issued March 2004.

arbitration.<sup>27</sup> It is obvious that reference to arbitration in these cases is purely declaratory and does not add anything to the fact that the investor may have a right to resort to arbitration pursuant to a BIT or multilateral treaty.

A considerable number of laws make reference to ICSID jurisdiction or ICSID arbitration. This happens in many different ways.<sup>28</sup>

At one end of the spectrum are domestic laws clearly containing a standing offer by the state to submit disputes to ICSID. This is the case when the piece of legislation uses formulations such as 'the host state hereby consents' or 'the consent of the host state is constituted by this article'.<sup>29</sup> Such crystal-clear language leaves no room for doubt. For example, article 8(2) of Albania's Foreign Investment Law of 1993 provides that 'the foreign investor may submit the dispute for resolution, and the Republic of Albania hereby consents to submission thereof, to [ICSID]'. This provision was at issue in the *Tradex Hellas v. Albania* case.<sup>30</sup> The ICSID tribunal found that Albania had 'unambiguously' consented to the jurisdiction of the Centre by way of that legislative provision.<sup>31</sup>

<sup>27</sup> See e.g., art. 43 of Algeria's Investment Law No. 93-12, *Investment Laws of the World*, ICSID Release 95-1, issued January 1995; art. 10 of the Law of the Republic of Uzbekistan on Guarantees and Measures to Protect Foreign Investors' Rights, 30 April 1998, *Investment Laws of the World*, ICSID Release 98-2, issued November 1998; art. 22 of Ethiopia's Investment Proclamation No. 37/1996, *Investment Laws of the World*, ICSID Release 99-1, issued May 1999; art. 11 of Guatemala's Foreign Investment Law (Decree No. 9-98) of 3 March 1998, *Investment Laws of the World*, ICSID Release 99-1, issued May 1999; art. 9 of the Law of the Republic of Kazakhstan on Investments (8 January 2003, No. 373-II 3PK), *Investment Laws of the World*, ICSID Release 2004-1, issued March 2004.

<sup>28</sup> It has to be noted that a number of legislative provisions referring to ICSID also contain a separate clause referring to the Additional Facility, in case the investor does not meet the nationality requirements of Art. 25 of the ICSID Convention. These provisions are aimed at opening access to ICSID for those foreign investors whose home states are not yet contracting parties to the Convention.

<sup>29</sup> See e.g., art. 5 of Togo's Investment Code (Law No. 89-22 of 31 October 1989), *Investment Laws of the World*, ICSID Release 2009-1, issued March 2009 ('Le consentement des parties à la compétence du CIRDI requis par les instruments le régissant, est constitué en ce qui concerne la République togolaise par le présent article et, en ce qui concerne la personne intéressée, est exprimé dans la demande d'agrément') [The consent of the parties to the jurisdiction of ICSID, required by the instruments governing it, is, for the Republic of Togo, made up of this article, and, for the concerned entity, is contained in its application for approval]; art. 21 of Mali's Law No. 91-048/AN-RM of 26 February 1991 Bearing on Investment Law, *Investment Laws of the World*, ICSID Release 2000-2, issued November 2000 ('The consent [to ICSID arbitration] is made up of this article, as far as the government is concerned; it is expressly set out in the application for approval, as far as investors are concerned'); art. 24 of Law No. 95-620 of 3 August 1995 on the Investment Code of the Republic of Côte d'Ivoire, *Investment Laws of the World*, ICSID Release 97-2, issued October 1997 ('The consent of the parties with regard to the competence of the ICSID or of the Supplementary mechanism, as the case may be, required by the instruments governing them, shall, for the Republic of Côte d'Ivoire, be constituted by this article and is expressly contained in the approval application for the entity concerned'); art. 38 of the Code des Investissements of the Democratic Republic of Congo (Law No. 004/2004 of 21 February 2002), *Investment Laws of the World*, ICSID Release 2004-2, issued November 2004 ('Le consentement des parties à la compétence du CIRDI ou du Mécanisme Supplémentaire, selon le cas, requis par les instruments les régissant, est constitué en ce qui concerne la République Démocratique du Congo par le présent article et en ce qui concerne l'investisseur par sa demande d'admission au régime de la présente loi ou ultérieurement par acte séparé') [The consent of the parties to the jurisdiction of ICSID or of the Additional Facility, as the case may be, required by the instruments governing them, is made up of this article, as far as the Democratic Republic of Congo is concerned, and is contained in the application for approval under this law or in a further distinct act, as far as the investor is concerned].

<sup>30</sup> *Tradex Hellas v. Albania*, *supra* n. 13 at pp. 171-178 (reproducing Albania's Foreign Investment Law of 1993).

<sup>31</sup> *Ibid.* pp. 186-187.



Even in the absence of such explicit statements of consent by the state, the offer to submit disputes to ICSID may nonetheless result from phrases which are worded so as to grant investors an unrestricted and unequivocal right to submit a dispute to ICSID. This was, for example, the case of Georgia's and El Salvador's Foreign Investment Laws, which were examined by the two ICSID tribunals in *Zhinvali v. Georgia*<sup>32</sup> and in *Inceysa Vallisoletana v. El Salvador*,<sup>33</sup> respectively. Both tribunals found that the relevant piece of legislation embodied state consent to ICSID.<sup>34</sup>

At the opposite end of the spectrum stand those likewise clear formulations which, despite mentioning ICSID, unambiguously require a further ad hoc consent between the parties before the dispute can be brought before that forum. Language varies: the legislation may point to ICSID jurisdiction, but only 'upon express agreement of both parties' or 'as may be mutually agreed by the parties';<sup>35</sup> or it may require that consent to ICSID be contained in the relevant concession agreement between the state and the foreign investor.<sup>36</sup> Such laws evince that the state wishes to reserve a margin of discretion as to the choice of going to arbitration, with the consequence that the investor has no right to start arbitral proceedings directly before ICSID, unless the state has expressly consented to that forum in a compromissory clause or a *compromis*. For example, Tanzania's Investment Act of 1997 provides that disputes with foreign investors may be submitted to arbitration, including ICSID, 'as may be mutually agreed by the parties'.<sup>37</sup> The arbitral tribunal in *Biwater Gauff v. Tanzania* correctly found that such a provision did not embody a 'standing unilateral offer' to arbitrate by Tanzania, but that a subsequent, separate ad hoc consent was required.<sup>38</sup> The tribunal emphasised that the language 'as may be mutually agreed by the parties' was an insurmountable obstacle to finding a standing unilateral offer to arbitrate which could be simply accepted by the investor.<sup>39</sup>

In between these two poles (clear offer by the state, on the one hand, and further manifestation of consent of the parties, on the other), there is a vast grey area of domestic laws distinguished by unclear and imprecise formulations. These are the instances which are most likely to raise doubts as to whether or not the state has expressed its consent to arbitration. These are also the cases which will likely be debated at the jurisdictional phase of an arbitration, and which will therefore require careful interpretation.

<sup>32</sup> *Zhinvali Development Ltd v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003, 10 ICSID Rep. 3. Article 16 of Georgia's Investment Law is reproduced at para. 337 of the award.

<sup>33</sup> *Inceysa Vallisoletana, SL v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, available at <http://ita.law.uvic.ca>. Article 15 of the Investment Law of El Salvador is reproduced at para. 268 of the award.

<sup>34</sup> See *Zhinvali v. Georgia*, *supra* n. 32 at paras. 328–342; *Inceysa Vallisoletana v. El Salvador*, *supra* n. 33 at para. 332.

<sup>35</sup> See e.g., art. 25(2) of Mozambique's Law on Investment No. 3/93 of 24 June 1993, *Investment Laws of the World*, ICSID Release 2004-1, issued March 2004.

<sup>36</sup> See art. 27(2) of Slovenia's Foreign Investments Law 1988, as amended 1993, *Investment Laws of the World*, ICSID Release 95-3, issued June 1995.

<sup>37</sup> See art. 23(2) of the Tanzania Investment Act, 9 September 1997, *Investment Laws of the World*, ICSID Release 99-1, issued May 1999.

<sup>38</sup> *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 329.

<sup>39</sup> *Ibid.*

In this category of unclear formulations there are first of all instances where reference to ICSID appears to be only for 'didactic' purposes. In other words, the host country's legislator simply informs possible foreign investors that the state is a party to the ICSID Convention.<sup>40</sup> It might be wondered what the significance of a reference to ICSID of this kind, devoid of any actual commitment to consent to arbitration, can be, since the information that a state is a party to the ICSID Convention can easily be found on sources available to everyone.<sup>41</sup> The possible argument, which a foreign investor might be tempted to make in an arbitral proceeding, that there would be no point in referring to ICSID other than to consent to international arbitration appears, however, untenable. In *Biwater Gauff*, the tribunal addressed that argument and convincingly observed that:

Given that one of the contracting parties will be a State, there are many reasons why its options for future agreements might be carefully defined and delimited in advance. Section 23.2 [of Tanzania's Foreign Investment Law] clears the way for the State to conclude specific types of dispute resolution agreement, without internal issues such as *ultra vires* arising, and as such it provides a degree of certainty for investors.<sup>42</sup>

It may be added that such a signal sent by the state to potential foreign investors is even more meaningful if the state at issue has been historically hostile to international arbitration as a means of resolving disputes with private companies.

The major difficulties arise in those cases where the domestic law refers to ICSID in more mandatory but nonetheless vague terms, by stating, for instance, that disputes will be resolved 'within the framework' of ICSID, or by appending to the dispute settlement clause certain disclaimers, qualifications, provisos or limitations, such as 'if applicable' or 'where the Convention applies'. This is, for example, the case of article 22 of Venezuela's Foreign Investment Law of 1999, which was discussed in the *Mobil* and *Cemex* cases.

Article 22 provides that:

Disputes arising between an international investor whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or disputes to which the provisions of the Convention establishing the Multilateral Investment Guarantee Agency (OMGI-MIGA) or the Convention on the Settlement of Investment Disputes between States and national of other States (ICSID) are applicable, shall be submitted to international arbitration according to the terms of the respective treaty or agreement, *if it so provides*, without prejudice to the possibility of making use, when appropriate, of the dispute resolution means provided for under the Venezuelan legislation in effect.<sup>43</sup>

<sup>40</sup> See e.g., art. 43 of Zimbabwe's Law on the Promotion of Investment of 1989, *Investment Laws of the World*, ICSID Release 90-2, issued June 1990; art. 18 of Malawi's Investment Promotion Act (No. 28 of 1991), *Investment Laws of the World*, ICSID Release 93-1, issued June 1993.

<sup>41</sup> For example on ICSID's website at <http://icsid.worldbank.org>.

<sup>42</sup> *Biwater Gauff v. Tanzania*, *supra* n. 38 at para. 331.

<sup>43</sup> See art. 22 of Venezuela's Foreign Investment Law (Decreto No. 356, Decreto con Rango y Fuerza de Ley de Promoción y Protección de Inversiones, Official Gazette No. 5.390 (Extraordinary), published 22 October 1999). The English translation is quoted from *CEMEX v. Venezuela*, *supra* n. 3 at para. 64 (emphasis added).

The tribunals in *Mobil* and *Cemex* found that article 22 did not embody consent to ICSID arbitration and declined jurisdiction under the Venezuelan statute.<sup>44</sup>

The most famous case where a clause of this kind was examined is *SPP v. Egypt*, sometimes referred to as the 'Pyramids case', which appears to be the first case brought before ICSID on the basis of a domestic law provision, and which in some respects constitutes the landmark case on the topic of consent expressed through a domestic law.<sup>45</sup> In that case the investor claimed that Egypt had given its consent to the Centre's jurisdiction when it enacted Law No. 43 in 1974 and that the investor's own consent was expressed in a letter from its managing director to Egypt's Minister of Tourism and again by the act of filing its request for ICSID arbitration.<sup>46</sup>

Article 8 of Law No. 43 of 1974 provided that:

Investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries [*sic*] to which Egypt has adhered by virtue of Law No. 90 of 1971, where such Convention applies.<sup>47</sup>

Egypt argued that such a provision was not a sufficient basis for the Centre's jurisdiction. The tribunal carefully analysed article 8 of Egypt's Foreign Investment Law and came to the conclusion that no separate ad hoc manifestation of consent between the parties was needed.<sup>48</sup> Therefore, it upheld jurisdiction pursuant to Article 25(1) of the ICSID Convention.

In 1989, following the *SPP* tribunal's rulings on jurisdiction, Egypt amended its Investment Law, by changing the language of the arbitration clause. The new version of the Investment Law, contrary to the one on which *SPP* was able to rely

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On Venezuela's Foreign Investment Law, see Tejera Pérez, *supra* note 2; Andrés A. Mezgravis, 'Las inversiones petroleras en Venezuela y el arbitraje ante el CIADI' in I. de Valera (ed.), *Arbitraje comercial interno e internacional, Reflexiones teóricas y experiencias prácticas* (2005), p. 354; Eugenio Hernández-Breton, 'Protección de inversiones en Venezuela' in (2005) *Derecho del Comercio Internacional Temas y Actualidades (DeCITA)* 270; Guillaume Lemenez de Kerdelleau, 'State Consent to ICSID Arbitration: Article 22 of the Venezuelan Investment Law' in (2007) 4(3) *Transnational Dispute Management* (June), available at [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com); Gabriela Álvarez Ávila, 'Las características del arbitraje del CIADI' in (2002) 2 *Anuario Mexicano de Derecho Internacional* 205 at pp. 211–212, n. 23 (where Venezuela's Foreign Investment Law is mentioned precisely as an example of a domestic legislation providing consent to ICSID pursuant to Art. 25(1) of the ICSID Convention). See also, *supra* n. 2 for other ICSID cases involving the application of art. 22 of Venezuela's Foreign Investment Law.

<sup>44</sup> Jurisdiction was conversely affirmed under the Netherlands–Venezuela BIT.

<sup>45</sup> *Southern Pacific Properties (Middle East) Ltd (SPP) v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 27 April 1985, 3 ICSID Rep. 112 ('Decision on Jurisdiction I'), and Decision on Jurisdiction, 14 April 1988, *ibid.* p. 131 ('Decision on Jurisdiction II').

<sup>46</sup> *SPP v. Egypt*, Decision on Jurisdiction I, *supra* n. 45 at para. 48.

<sup>47</sup> *Ibid.* para. 70.

<sup>48</sup> *SPP v. Egypt*, Decision on Jurisdiction II, *supra* n. 45 at para. 116. Paulsson, *supra* n. 10 at p. 235, reports that in *Manufacturers Hanover Trust Co. v. Arab Republic of Egypt and General Authority for Investment and Free Zones*, the 'claimant investor also successfully relied on this form of legislative consent to ICSID'. A settlement was reached in this case after a decision on jurisdiction had been rendered. *Ibid.* n. 6.

in its claim, specified that the reference to ICSID had to be intended not as binding consent, but as a mere 'offer to deal', the final decision being left to a subsequent agreement between the parties.<sup>49</sup>

#### IV. INTERPRETATION OF ICSID CLAUSES CONTAINED IN DOMESTIC LAWS

##### (a) *Text, Context and Restrictive Interpretation*

The remark that investment laws referring to ICSID may require a careful analysis by an arbitral tribunal faced with the issue of ascertaining whether it has jurisdiction over a certain case leads us to the question of interpretation of dispute settlement clauses contained in such laws. This topic involves addressing various questions: what is the correct canon or standard of interpretation to be applied to consent to ICSID contained in a domestic law? In case of doubt, should a presumption in favour or against consent prevail? Should the investor or the host state ultimately bear the risk of ambiguous formulations?

Any discussion on this topic must begin by considering whether the sources for the correct standards of interpretation must be found in the host state's domestic principles or directly in international law. Since an investment law or code is part of the legislation of a state, one might argue that for this reason a clause included therein should be construed in light of the interpretative principles of that state. This was basically the stance taken by the dissenting opinion in *SPP v. Egypt*.<sup>50</sup> However, this perspective does not appear satisfying.

A legislative provision containing a possible offer to arbitrate before ICSID certainly has not only a domestic meaning, but also an international one.<sup>51</sup> The meaning on the international plane is given by the fact that the offer may create an obligation of the state within the legal framework of a multilateral treaty (i.e. the ICSID Convention). In other words, an offer contained in a piece of domestic legislation aimed at establishing ICSID jurisdiction has to be viewed as a unilateral act of the state capable of giving rise to international legal obligations. This concept had already been alluded to by the *SPP* tribunal examining Egypt's

<sup>49</sup> See art. 55 of Egyptian Investment Law No. 230 of 20 July 1989, *Investment Laws of the World*, ICSID Release 90-2, issued June 1990: 'Without prejudice to the right to resort to Egyptian courts, investment disputes related to the implementation of the provisions of this Law may be settled in the manner to be agreed upon with the investor. The parties concerned may also agree to settle such disputes within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country or within the framework of the Convention for Settlement of Investment Disputes between states and nationals of other states to which the Arab Republic of Egypt has adhered by Law No. 90 of 1971, subject to the terms and conditions, and in the instances where such agreements do apply' (emphasis added). A similar formulation can be found in art. 7 of Egypt's subsequent Law No. 8 of 11 May 1997 Promulgating the Law on Investment Guarantees and Incentives, *Investment Laws of the World*, ICSID Release 97-2, issued October 1997. See also, Delaume, *supra* n. 4 at pp. 161–163.

<sup>50</sup> See *SPP v. Egypt*, Decision on Jurisdiction II, *supra* n. 45, Dissenting Opinion of Mohamed Amin El Mahdi, 3 ICSID Rep. 112 at pp. 163–188, 170 and 177.

<sup>51</sup> See David Caron, 'The Interpretation of National Foreign Investment Laws as Unilateral Acts under International Law' in Mahnouch Arsanjani *et al.* (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2010), pp. 649–674.

Foreign Investment Law when it noted that ‘the issue is whether certain unilaterally enacted legislation has created an international obligation under a multilateral treaty’,<sup>52</sup> and was expressly confirmed by the tribunals in *Mobil v. Venezuela* and *Cemex v. Venezuela*.<sup>53</sup> Recent scholarship has added a more complete theoretical frame to this issue.<sup>54</sup> Being a unilateral act under international law, such a foreign investment law therefore has to be examined in light of the canons of interpretation to be found in international law. This does not mean that domestic law considerations will have no role to play at all when assessing such legislation. For example, it will be only by referring to domestic law principles and rules that one will be able to understand whether that law has already entered into force or is still in force (which is an essential element to understanding whether consent has been perfected, as previously explained).<sup>55</sup> However, given the meaning that the law is able to bear on the international plane, international law standards of interpretation will ultimately be the ones applicable.<sup>56</sup>

<sup>52</sup> *SPP v. Egypt*, Decision on Jurisdiction II, *supra* n. 45 at para. 61.

<sup>53</sup> *Mobil v. Venezuela*, *supra* n. 3 at paras. 83–85; *CEMEX v. Venezuela*, *supra* n. 3 at paras. 77–79.

<sup>54</sup> See, in particular, Caron, *supra* n. 51. On this topic, see also, Yulia Andreeva, ‘Consent to Arbitration as a Unilateral Act of State: In Search for a Non-Conventional Approach Towards Treaty Interpretation’ in I. Laird and T. Weiler (eds.), *Investment Treaty Arbitration and International Law* (2010), vol. III, pp. 59–83.

<sup>55</sup> See *supra*.

<sup>56</sup> See *Zhinvali v. Georgia*, *supra* n. 32 at para. 297 (‘in applying the ICSID Convention, an ICSID tribunal must first, in the absence of express agreement between the parties to the contrary, pay heed to the domestic law of the respondent State but then must test the requirements of that domestic law against the tenets of public international law to the extent “applicable”’) and para. 339 (‘if the national law of Georgia addresses this question of “consent”, which the Tribunal finds that it does, then the Tribunal must follow that national law guidance but always subject to ultimate governance by international law’). See also, *Mobil v. Venezuela*, *supra* n. 3 at para. 85. By the same token, the relevant domestic investment law may have been interpreted by the host state’s judiciary. This raises the problematic issue of the weight to be attributed by an ICSID tribunal to a domestic ruling bearing on the interpretation of that law. ICSID tribunals will obviously be free to take into consideration such a purely domestic ruling, but will not at all be bound by its conclusions. See *SPP v. Egypt*, Decision on Jurisdiction II, *supra* n. 45 at para. 60 (where the tribunal observed that ‘[w]hile Egypt’s interpretation of its own legislation is unquestionably entitled to considerable weight, it cannot control the Tribunal’s decision as to its own competence. The jurisprudence of the Permanent Court of International Justice and the International Court of Justice makes clear that a sovereign State’s interpretation of its own unilateral consent to the jurisdiction of an international tribunal is not binding on the tribunal or determinative of jurisdictional issues. (*The Electricity Company of Sofia and Bulgaria*, Preliminary Objection, PCIJ Series A/B, No. 77, p. 64 (1939); *Aegean Sea Continental Shelf*, Judgment [1978] ICJ Rep. 3). Indeed, to conclude otherwise would contravene Article 41(1) of the Washington Convention, which provides that: “The Tribunal shall be the judge of its own competence”). See also, recently, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 30 November 2010 (where the ICJ held that ‘it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts ... Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation’). A problem of this kind has also arisen in relation to arbitral proceedings where Venezuela’s Investment Law is at issue, since that law has been the object of a very controversial ruling by Venezuela’s Supreme Tribunal. See Judgment No. 1541 of 17 October 2008 of the Venezuelan Supreme Tribunal, available at [www.tsj.gov.ve/decisiones/scon/Octubre/1541-171008-08-0763.htm](http://www.tsj.gov.ve/decisiones/scon/Octubre/1541-171008-08-0763.htm) (holding that art. 22 of Venezuela’s Foreign Investment Law does not provide for a unilateral offer to consent to ICSID). The *Mobil* and *CEMEX* tribunals, citing to PCIJ/ICJ case law, held that the interpretation of art. 22 by Venezuelan authorities or by Venezuelan courts could not control the tribunal’s decision on its competence. See *Mobil v. Venezuela*, *supra* n. 3 at para. 75 and *CEMEX v. Venezuela*, *supra* n. 3 at para. 70.

Once more, a passage from the *SPP* case, dealing exactly with this topic, is particularly instructive:

in deciding whether in the circumstances of the present case Law No. 43 constitutes consent to the Centre's jurisdiction, the Tribunal will apply general principles of statutory interpretation taking into consideration, where appropriate, relevant rules of treaty interpretation and *principles of international law applicable to unilateral declarations*.<sup>57</sup>

The question, therefore, is to determine what are those principles of international law applicable to (the interpretation of) unilateral declarations.

The principle that a written or oral declaration made by a state official, without any reciprocal commitment or response and outside the context of formal negotiations, may give rise to binding obligations is well established under international law and was affirmed by the International Court of Justice (ICJ) in the *Nuclear Tests* cases.<sup>58</sup> The ICJ linked the legal effects connected to unilateral declarations to the principle of good faith: 'Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration'.<sup>59</sup>

The ILC devoted many years of its work to the issue of unilateral acts. The topic was included in its agenda in 1996. Special Rapporteur Victor Rodríguez Cedeño produced nine reports. In 2006, the ILC adopted 'Guiding Principles applicable to unilateral declarations of states capable of creating legal obligations', with commentaries thereto ('ILC Guiding Principles').<sup>60</sup> It is noteworthy that the perspective taken by both the ICJ in *Nuclear Tests* and by the ILC in its codification work is a state-to-state perspective.<sup>61</sup> However, there is no reason why the same legal principles could not be applied to unilateral declarations made by states to private entities, where an investor has reasonably relied on a unilateral statement or declaration which a state has made to him.<sup>62</sup> It has been pointed out that the conclusion that 'a unilateral act has given rise to a binding obligation will probably be reinforced if the state making the declaration expects to receive clear benefits on the basis of the declaration'.<sup>63</sup> This is exactly the case of investment

<sup>57</sup> *SPP v. Egypt*, Decision on Jurisdiction II, *supra* n. 45 at para. 61 (emphasis added).

<sup>58</sup> *Nuclear Tests (Australia v. France)*, Judgment [1974] ICJ Rep. 253, para. 43. This paragraph is quoted by the ICJ in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, Judgment [1984] ICJ Rep. 392, para. 59. See also, *Frontier Dispute (Burkina Faso v. Mali)*, Judgment [1986] ICJ Rep. 554, paras. 39–40.

<sup>59</sup> *Nuclear Tests*, *supra* n. 58 at para. 46.

<sup>60</sup> The ILC Guiding Principles can be found at [www.un.org/law/ilc](http://www.un.org/law/ilc).

<sup>61</sup> Principle 1 of the ILC Guiding Principles reads: 'Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected'.

<sup>62</sup> See Michael Reisman and Mahnoush Arsanjani, 'The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes' in P.M. Dupuy, B. Fassbender, M. Shaw and K.P. Sommermann (eds.), *Völkerrecht als Wertordnung [Common Values in International Law]*, *Festschrift für Christian Tomuschat [Essays in Honour of Christian Tomuschat]* (2006), p. 409 at pp. 419, 422 (citing to *Revere Copper and Brass, Inc. v. OPIC*, Award, 24 August 1978, (1978) 17 ILM 1321 at p. 1331).

<sup>63</sup> Reisman and Arsanjani, *supra* n. 62 at p. 416.

laws, which are enacted by a state with the precise aim of attracting foreign capital to boost the country's economy. Therefore, the ILC's Guiding Principles would appear, at least in principle, also applicable to domestic laws including an offer to arbitrate before ICSID, given the nature of a unilateral act possibly binding the state on the international plane.<sup>64</sup>

In its work on unilateral acts, the ILC also addressed the issue of interpretation of such acts.

Principle 7 of the ILC Guiding Principles, last sentence, reads: 'In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated'. The analogy to the rule of interpretation of treaties contained in Article 31(1) of the Vienna Convention on the Law of Treaties is evident.<sup>65</sup> The idea of an application by analogy of the rules of interpretation derived from the Vienna Convention appears also from the commentary accompanying the final text of the ILC Guiding Principles, as well as from some of the Special Rapporteur's reports.<sup>66</sup>

Following the ILC guideline contained in Principle 7, an arbitral tribunal faced with the task of interpreting a dispute settlement clause included in a domestic law would 'first and foremost' have to embark on a textual analysis of the provision. As recognised by the *SPP* tribunal, '[t]he starting point in statutory interpretation, as in the interpretation of treaties and unilateral declarations, is the ordinary or grammatical meaning of the terms used'.<sup>67</sup> The analysis will likely aim at understanding whether the reference to ICSID jurisdiction is formulated in mandatory terms or, on the contrary, subject to a further manifestation of will by the state. In this respect, the particular usage of verbs ('shall', 'must', 'may', etc.) might be taken into consideration. For instance, in *SPP* the tribunal focused on the 'shall be settled' language in article 8 of the Egyptian Investment Law (as opposed to 'may be' which had been used in a different paragraph of the same law), and concluded, relying also on a dictum of the ICJ,<sup>68</sup> that such expression mandated the submission of disputes to the various methods prescribed therein (as opposed to making them purely optional and subject to a

<sup>64</sup> It must be noted that the ILC in its work on unilateral declarations of states did not take foreign investment laws into consideration. On this, see Caron, *supra* n. 51 at pp. 668–671.

<sup>65</sup> Article 31(1) of the Vienna Convention on the Law of Treaties reads: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

<sup>66</sup> See para. 3 of the commentary under Principle 7 of the ILC Guiding Principles; see also, Victor Rodríguez Cedeño, Special Rapporteur, *Fourth Report on Unilateral Acts of States*, UN Doc. A/CN.4/519 (30 May 2001), paras. 101–152. See also, *Mobil v. Venezuela*, *supra* n. 3 at para. 96. On the issue of interpretation of dispute settlement clauses contained in investment treaties, see Gabrielle Kaufmann-Kohler, 'Interpretation of Treaties: How Do Arbitral Tribunals Interpret Dispute Settlement Provisions Embodied in Investment Treaties?' in L. Mistelis and J. Lew (eds.), *Pervasive Problems in International Arbitration* (2006), p. 257.

<sup>67</sup> *SPP v. Egypt*, Decision on Jurisdiction II, *supra* n. 45 at para. 74.

<sup>68</sup> *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion of 8 June 1960, [1960] ICJ Rep. 150 at p. 159 (where the ICJ held that the words 'shall be' were 'on their face ... mandatory').

further consent by the state).<sup>69</sup> The textual analysis of the relevant domestic law provision was also the starting point in *Mobil* and *Cemex*.<sup>70</sup>

Secondly, the ILC Guiding Principles direct the interpreter to 'give weight' to the 'context and circumstances' in which the unilateral act was formulated. Although in this regard the ILC did not appear to have incorporated the 'object and purpose' language pursuant to Article 31(1) of the Vienna Convention,<sup>71</sup> it might not be overlooked (as part of the 'context' in which the dispute settlement provision is inserted) that the law containing the clause is intended to promote and protect foreign investments (exactly in the same way as does a BIT).<sup>72</sup> And of course the right to resort to an independent forum for the resolution of disputes such as ICSID would seem to be part (if not the core) of the legal protection to which investors aspire. This observation, however, should not be overstated: the emphasis on the 'context' formed by the investment law as a whole should not lead the interpreter to automatically conclude in favour of ICSID jurisdiction. A state may be willing to offer the broadest substantive safeguards to foreign investors (in terms of standards of treatment, protection from expropriation, etc.), but might want to withhold procedural rights, exactly as happens in certain BITs.<sup>73</sup>

Finally, the ILC provided a rule of interpretation in the event that there is a 'doubt as to the scope of the obligations resulting from [a unilateral] declaration'. Due to its 'residual' nature ('in the case of doubt'), it would have probably appeared more logical to have this rule close, rather than open, Principle 7. Be that as it may, Principle 7 in its first two sentences reads:

A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner.

This rule of restrictive interpretation has been marked by Professor Caron as a 'departure from the approach of the Vienna Convention to interpretation'.<sup>74</sup> The same author has argued that 'this principle does not appear to have been settled upon having in mind, or to appear justified in the case of, the interpretation of a deliberate written piece of legislation pertaining to either a national foreign investment law or a consent to ICSID jurisdiction'.<sup>75</sup>

The argument for a restrictive interpretation of consent clauses is in fact not at all unknown in ICSID arbitrations: on the contrary it is a 'recurrent theme in the

<sup>69</sup> *SPP v. Egypt*, Decision on Jurisdiction II, *supra* n. 45 at paras. 74–82.

<sup>70</sup> *Mobil v. Venezuela*, *supra* n. 3 at paras. 97–111; *CEMEX v. Venezuela*, *supra* n. 3 at paras. 90–103.

<sup>71</sup> On this, see *extensively*, Caron, *supra* n. 51 at pp. 662–663 (also detailing discussions amongst ILC members on the 'object and purpose' language).

<sup>72</sup> See *Zhinvali v. Georgia*, *supra* n. 32 at para. 335 (where the tribunal considered 'the purpose as well as the context' of art. 16(2) of Georgia's Foreign Investment Law).

<sup>73</sup> For a discussion of art. 22 in relation to the 'context and purpose' of the Venezuelan Foreign Investment Law, see *CEMEX v. Venezuela*, *supra* n. 3 at paras. 116–126.

<sup>74</sup> Caron, *supra* note 51 at p. 665.

<sup>75</sup> *Ibid.*



pleadings' by respondent states.<sup>76</sup> However, it has generally been considered not to be germane to ICSID arbitration by arbitral tribunals who have taken a much more 'balanced' approach. With the probably sole exception of a short passage in *Tradex v. Albania*, where the tribunal appeared to lean more towards an extensive interpretation of consent,<sup>77</sup> tribunals have usually taken the 'neither broad nor restrictive approach'.<sup>78</sup> A passage from the award in *Amco Asia et al. v. Indonesia* (dealing with consent arising out of an agreement between the parties) is frequently cited to by other arbitral tribunals dealing with the interpretation of consent.<sup>79</sup> In *Amco*, the tribunal noted that:

In the first place, like any other conventions, a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties ... Moreover – and this is again a general principle of law – any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged.<sup>80</sup>

In the specific area of interpretation of consent clauses in domestic laws, the *SPP* tribunal observed that:

jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if – but only if – the force of the arguments militating in favor of it is preponderant.<sup>81</sup>

Interestingly, the tribunals in *Mobil* and *Cemex* made reference to the ILC Guiding Principles and to the standard of restrictive interpretation contained

<sup>76</sup> See Schreuer *et al.*, *supra* n. 4 at p. 251.

<sup>77</sup> *Tradex Hellas v. Albania*, *supra* n. 13 at p. 194 ('It would, therefore, seem appropriate to at least take into account, though not as a decisive factor by itself but rather as a confirming factor, that in case of doubt the 1993 Law should rather be interpreted in favour of investor protection and in favour of ICSID jurisdiction in particular'). Those who argue in favour of a broad interpretation of consent typically make use of the canon of 'effective interpretation', whereby a clause in a legal text is to be interpreted in a meaningful rather than in a meaningless way. See Schreuer *et al.*, *supra* n. 4 at p. 251; Tejera Pérez, *supra* n. 2 at p. 113. See also, *SPP v. Egypt*, Decision on Jurisdiction II, *supra* n. 45 at paras. 94–96; *Mobil v. Venezuela*, *supra* n. 3 at paras. 112–119 and *CEMEX v. Venezuela*, *supra* n. 3 at paras. 104–115 (where the two tribunals noted that the principle of *effet utile* has an important role to play in the law of treaties, but should not be taken into account in the interpretation of unilateral acts).

<sup>78</sup> See e.g., *Amco Asia et al. v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, (1984) 23 ILM 351, paras. 12–24; *Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal*, ICSID Case No. ARB/82/1, Award, 25 February 1988, 2 ICSID Rep. 190, paras. 4.08–4.10; *Cable TV v. St. Kitts and Nevis*, ICSID Case No. ARB/95/2, Award, 16 December 1996, (1998) 13 ICSID Rev. – Foreign Inv. LJ 328, para. 6.27; *CSOB v. Slovakia*, *supra* n. 13 at para. 34; *Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Decision on Competence and Jurisdiction, 9 January 2001, 7 ICSID Rep. 425, para. 51; *Mondev Int'l Ltd v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, 6 ICSID Rep. 192, paras. 42–43.

<sup>79</sup> See e.g., *Cable TV v. St. Kitts and Nevis*, *supra* n. 78 at para. 6.27; *CSOB v. Slovakia*, *supra* n. 13 at para. 34; *Loewen v. United States*, *supra* n. 78 at para. 51; *Inceysa Vallisoletana v. El Salvador*, *supra* n. 33 at para. 177.

<sup>80</sup> *Amco Asia et al. v. Indonesia*, *supra* n. 78 at para. 14.

<sup>81</sup> *SPP v. Egypt*, Decision on Jurisdiction II, *supra* n. 45 at para. 63.

therein,<sup>82</sup> but appeared to deny that these principles ought to be applied to the interpretation of article 22 of Venezuela's Foreign Investment Law.<sup>83</sup> In fact, the principle of restrictive interpretation appeared to play no role at all in the final decision by the two tribunals.

In their analyses on the correct standard of interpretation of a domestic piece of legislation embodying an offer to arbitrate, the two tribunals gave predominant weight to the ICJ case law on the interpretation of unilateral declarations, in particular optional declarations of compulsory jurisdiction of the Court made under Article 36(2) of the ICJ Statute. Both tribunals recalled the ICJ's dicta whereby a unilateral declaration 'must be interpreted as it stands, having regard to the words actually used',<sup>84</sup> and that due consideration should be paid to the *intention* of the state having formulated such acts, which can be deduced from the 'context', 'the circumstances of its preparation' and the 'purposes intended to be served'.<sup>85</sup> To be entirely clear, the *Cemex* tribunal stated that 'the intention of the declaring State must prevail'.<sup>86</sup> When the arbitrators in the two cases turned to the search for Venezuela's intention, they looked at several factors, including Venezuela's historical attitude *vis-à-vis* arbitration and the (lacking) legislative history of the statute, both of which did not provide conclusive evidence on the state's intention to submit investment disputes to mandatory arbitration. Finally, the tribunal noted that by looking at BITs entered into by Venezuela one could find evidence of clauses crafted in a more mandatory way. Thus, 'if it had been the intention of Venezuela to give its advance consent to ICSID arbitration in general, it would have been easy for the drafters of Article 22 to express that intention clearly by using any of those well known formulas'.<sup>87</sup>

Thus, the two ICSID tribunals drew a complete analogy with the regime applicable to the interpretation of declarations made under Article 36(2) of the ICJ Statute. It could, however, be questioned whether an indiscriminate analogy between an ICJ optional clause declaration and a foreign investment law (and the consequent emphasis placed on the search for the state's 'intention' behind the declaration) might always lead to fully satisfactory results. It might be a very hard task to ascertain what the real intent behind a piece of legislation is, especially if (as was the case with Venezuela) there are no *travaux préparatoires* or other official reports which could shed light on the drafters' intention. In such a case, it might be questioned whether greater emphasis should be placed on this subjective element or rather on the 'context' in which the dispute settlement provision was

<sup>82</sup> *Mobil v. Venezuela*, *supra* n. 3 at para. 89; *CEMEX v. Venezuela*, *supra* n. 3 at para. 82.

<sup>83</sup> *Mobil v. Venezuela*, *supra* n. 3 at para. 90 and *CEMEX v. Venezuela*, *supra* n. 3 at para. 83 (noting that the rules of interpretation applicable to consent contained in a domestic law provision are 'somewhat different' to the ones formulated by the ICJ in the *Nuclear Tests* and *Armed Activities* cases and adopted by the ILC in its Guiding Principles, due to the fact that an offer of consent to ICSID contained in a domestic law is a unilateral declaration 'formulated in the framework of a treaty and on the basis of such a treaty').

<sup>84</sup> *Mobil v. Venezuela*, *supra* n. 3 at para. 92; *CEMEX v. Venezuela*, *supra* n. 3 at para. 85.

<sup>85</sup> *Mobil v. Venezuela*, *supra* n. 3 at para. 94; *CEMEX v. Venezuela*, *supra* n. 3 at para. 87.

<sup>86</sup> *CEMEX v. Venezuela*, *supra* n. 3 at para. 87.

<sup>87</sup> *Mobil v. Venezuela*, *supra* n. 3 at para. 139. See also, *CEMEX v. Venezuela*, *supra* n. 3 at para. 137 (in almost identical terms).

inserted, that is, a law enacted with the specific aim of attracting foreign capital into the host state. In relation to this, it might also be useful to evaluate how the dispute settlement clause has been perceived, reasonably and in good faith, by its natural addressee, the foreign investors. The ILC Guiding Principles, which direct the interpreter to take account, amongst other factors, also of the 'reactions' to which the unilateral declaration gave rise, could be, once more, of support here.<sup>88</sup>

(b) *Good Faith and the Duty to Avoid Ambiguities*

As already noted, the ICJ linked the binding character of an international obligation assumed by unilateral declaration to the principle of good faith.<sup>89</sup> Principle 1 of the ILC Guiding Principles also states that 'the binding character of such declarations is based on good faith'. Tribunals have many times called for an interpretation in good faith of jurisdictional instruments.<sup>90</sup> The ICSID tribunal in *SOABI v. Senegal*, dealing with consent contained in an agreement between the state and the investor, stressed the need to take into account investors' legitimate expectations:

In the Tribunal's opinion, an arbitration agreement must be given, just as with any other agreement, an interpretation consistent with the principle of good faith. In other words, the interpretation must take into account the consequences which the parties must reasonably and legitimately be considered to have envisaged as flowing from their undertakings. It is this principle of interpretation, rather than one of *a priori* strict, or, for that matter, broad and liberal construction, that the Tribunal has chosen to apply.<sup>91</sup>

To interpret in good faith means to avoid unintended and literal interpretations of words that might result in one of the parties gaining an unfair or unjust advantage over another party.<sup>92</sup> Good faith requires an arbitral tribunal to examine whether foreign investors have formed any reasonable and legitimate expectations as to the availability of ICSID remedies pursuant to a domestic law. In this regard, it has been argued that the risk of ambiguities capable of misleading investors should be borne by the host state which has enacted equivocally worded legislation.<sup>93</sup>

<sup>88</sup> See ILC Guiding Principle 3: 'To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise' (emphasis added).

<sup>89</sup> *Nuclear Tests*, *supra* n. 58 at para. 46.

<sup>90</sup> See *Amco Asia et al. v. Indonesia*, *supra* n. 78 at paras. 14 and 23; *SPP v. Egypt*, Decision on Jurisdiction II, *supra* n. 45 at para. 63; *Cable TV v. St. Kitts*, *supra* n. 78 at para. 6.27; *CSOB v. Slovakia*, *supra* n. 13 at para. 34; *Inceysa Vallisoletana v. El Salvador*, *supra* n. 33 at para. 181.

<sup>91</sup> *SOABI v. Senegal*, *supra* n. 78 at para. 4.10. See also, *Amco Asia et al. v. Indonesia*, *supra* n. 78 at para. 14, quoted *supra* in the text.

<sup>92</sup> Antony D'Amato, 'Good Faith' in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1995), vol. II, p. 599.

<sup>93</sup> See Caron, *supra* n. 51 at p. 673 (arguing that 'if a national foreign investment law is not a crystal-clear provision and incorporates certain grey areas of ambiguity, it is for the state making the unilateral act, who has unilaterally chosen, or chosen to maintain, an equivocal language when it enacted the legislation, to bear the risk of such ambiguity').

Lack of transparency and abuse of intentional ambiguities are discouraged in investment law. Late Professor Thomas Wälde's Separate Opinion in the *Thunderbird v. Mexico* case represents perhaps the best elucidation of the principles of transparency and legitimate expectations in international investment law:

The implications of the obligation to be clear and avoid ambiguity is that the government agency has to bear the risk of its own ambiguity. This allocation of the risk of ambiguity requires that the investor did and could reasonably have confidence in the assurance, not as an ultra-perfect lawyer equipped with a hindsight vision facility, but as a reasonable businessman in the position of the investor would do in the particular circumstances.<sup>94</sup>

To use the term employed by the ICJ in *Nuclear Tests*,<sup>95</sup> a foreign investor may have placed 'confidence' in the existence of a standing offer to arbitrate before ICSID contained in the host state's domestic law. Therefore, it would appear logical for an ICSID tribunal involved with the question of interpretation of such a clause to consider whether such confidence was reasonable. The question is likely to be discussed at length by both parties to the dispute during the jurisdictional phase of the arbitral proceedings.

## V. CONCLUSIONS

In conclusion, the analysis of a domestic law provision possibly embodying consent to ICSID's jurisdiction is an important task to be performed carefully both by the parties and the arbitrators. A state's consent to ICSID arbitration should never be presumed.<sup>96</sup> The claimant bears the burden of proving that there is a positive basis for consent in that given case. Rule 2 of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings provides that the request for arbitration must be supported by documentation concerning the instruments recording consent and their dates.<sup>97</sup> It is therefore of utmost importance for the investor to be able to persuade the tribunal that the 'unilateral act' constituted by the offer to arbitrate is formulated in binding terms. This article has attempted to provide a possible path which can be followed in the task of interpreting such domestic provisions. The critical role of investors' legitimate expectations has been highlighted. Of course, there is no exhaustive list of evidence which claimants may resort to in order to show that the host state has created legitimate expectations in them as to the possibility of having recourse to ICSID arbitration. The binding effect of the unilateral act contained in the domestic law may, for instance, be reinforced if the claimant is able to rely on

<sup>94</sup> *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Separate Opinion of Thomas Wälde, December 2005, para. 47, available at <http://ita.law.uvic.ca>. See also, *ibid.* para. 71.

<sup>95</sup> *Nuclear Tests*, *supra* n. 58 at para. 46.

<sup>96</sup> See *SPP v. Egypt*, Decision on Jurisdiction II, *supra* n. 45 at para. 63 (arguing that there is neither a presumption in favour nor a presumption against ICSID jurisdiction). See also, *Inceysa Vallisoletana v. El Salvador*, *supra* n. 33 at para. 176; *SOABI v. Senegal*, *supra* n. 78 at para. 4.09.

<sup>97</sup> The Institutional Rules are available on ICSID's website at <http://icsid.worldbank.org>.

advertisements by the host state's government (made to that single investor or *erga omnes*) on the availability of arbitral mechanisms. Legislative history on the provision may also be used as a fact on which the investor may have relied in good faith. The *Tradex* tribunal also took into account in its analysis of the consent clause the fact that there had been previous consecutive investment laws in Albania formulated in different terms.<sup>98</sup>

Although in a possible dispute with the host state, investors (and their lawyers) will likely look first to standards of protection contained in BITs or multilateral treaties, the importance of domestic investment laws as tools providing guarantees to private companies should not be overlooked. With particular regard to international arbitration, consent to ICSID may be found to the same degree in a treaty as in a piece of domestic legislation. At times, consent to ICSID contained in investment laws may even be the only recourse available where the investor's state of nationality has not entered into a BIT with the host state. Because of nationality restrictions or other possible limitations envisaged by BITs (such as waiting periods), a domestic provision granting jurisdiction to the Centre may therefore be regarded as the only gateway to an independent forum such as ICSID.

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<sup>98</sup> *Tradex Hellas v. Albania*, *supra* n. 13 at p. 192.

